

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

STEVE NEAL,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of the  
Social Security Administration,

Defendant.

CASE NO. 10cv5623 JRC

ORDER

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule (“MJR”) 13. (See also Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, ECF No. 4; Consent to Proceed Before a United States Magistrate Judge, ECF No. 12.) This matter has been fully briefed. (See ECF Nos.13, 14, 15.)

After considering and reviewing the relevant record, the undersigned finds that the Administrative Law Judge committed legal error in the evaluation of the lay witness testimony. This was not harmless error. The ALJ also did not evaluate properly plaintiff’s testimony. For these reasons, the Court sets aside the decision of defendant Commissioner and remands this matter for further consideration by the Social Security Administration.



1 September 7, 2010, plaintiff filed a complaint seeking judicial review of the ALJ's written  
2 decision (see ECF No. 3).

3 In his opening brief, plaintiff contends that: (1) the ALJ committed legal error in her  
4 evaluation of the testimony provided by the lay witness -- plaintiff's mother; (2) the ALJ  
5 committed legal error in her evaluation of the testimony provided by plaintiff; (3) the ALJ  
6 committed legal error in her evaluation of the side-effects of plaintiff's pain medication; (4) the  
7 ALJ committed legal error in her evaluation of the medical evidence, including that provided by  
8 Drs. Wingate, Harris and Boyle; and, (4) that this case should be remanded for an award of  
9 benefits. (See ECF No. 13, p. 11.)  
10

#### 11 STANDARD OF REVIEW

12 Plaintiff bears the burden of proving disability within the meaning of the Social Security  
13 Act (hereinafter "the Act"). Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999) (*citing*  
14 Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995)). The Act defines disability as the  
15 "inability to engage in any substantial gainful activity" due to a physical or mental impairment  
16 "which can be expected to result in death or which has lasted, or can be expected to last for a  
17 continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A).  
18 Plaintiff is disabled under the Act only if plaintiff's impairments are of such severity that  
19 plaintiff is unable to do previous work, and cannot, considering plaintiff's age, education, and  
20 work experience, engage in any other substantial gainful activity existing in the national  
21 economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); see also Tackett v. Apfel, 180 F.3d 1094,  
22 1098-99 (9th Cir. 1999).  
23  
24

25 Pursuant to 42 U.S.C. § 405(g), this court may set aside the Commissioner's denial of  
26 social security benefits if the ALJ's findings are based on legal error or not supported by

1 substantial evidence in the record as a whole. Bayliss v. Barnhart, 427 F.3d 1211, 1214 n.1 (9th  
 2 Cir. 2005) (*citing* Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1998)). “Substantial evidence” is  
 3 more than a scintilla, less than a preponderance, and is such ““relevant evidence as a reasonable  
 4 mind might accept as adequate to support a conclusion.”” Magallanes v. Bowen, 881 F.2d 747,  
 5 750 (9th Cir. 1989) (*quoting* Davis v. Heckler, 868 F.2d 323, 325-26 (9th Cir. 1989)); *see*  
 6 Richardson v. Perales, 402 U.S. 389, 401 (1971).

### 8 DISCUSSION

- 9 1. The ALJ did not evaluate properly the testimony and credibility of the lay witness --  
 10 plaintiff’s mother.

11 “In determining whether a claimant is disabled, an ALJ must consider lay witness  
 12 testimony concerning a claimant's ability to work.” Stout v. Commissioner, Social Security  
 13 Administration, 454 F.3d 1050, 1053 (9th Cir. 2006) (*citing* Dodrill v. Shalala, 12 F.3d 915, 919  
 14 (9th Cir. 1993)). Lay testimony as to a claimant's symptoms is competent evidence that an ALJ  
 15 must take into account, unless the ALJ expressly determines to disregard such testimony and  
 16 gives reasons germane to each witness for doing so. Bruce v. Astrue, 557 F.3d 1113, 1115 (9th  
 17 Cir. 2009); Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001); Van Nguyen, 100 F.3d at 1467  
 18 (*citing* Dodrill, 12 F.3d at 919); *see also* 20 C.F.R. § 404.1513(d)(3).  
 19

20 An ALJ may not rely on a witness’ relationship or financial interest as a reason to  
 21 discredit his or her testimony. Valentine v. Comm’r SSA, 574 F.3d 685, 694 (9th Cir. 2009).  
 22 Absent “evidence that a specific [lay witness] exaggerated a claimant’s symptoms *in order* to get  
 23 access to his disability benefits,” an ALJ may not reject that witness’ testimony with a general  
 24 finding that the witness is “an ‘interested party’ in the abstract.” Id. (Emphasis in original.)  
 25  
 26

1 Here, the ALJ gave only one reason for discounting the testimony by plaintiff's mother  
 2 regarding plaintiff's need for "rest periods during the day<sup>1</sup>." (See Tr. 26). The ALJ found that  
 3 "the mother has a vested interest in the award of disability benefits to [plaintiff]." (id.) The ALJ  
 4 does not specify what "vested interest" the mother has in her adult son's disability benefits, and  
 5 does not specify any "evidence that [this] specific [lay witness] exaggerated [plaintiff]'s  
 6 symptoms in order to get access to his disability benefits." (See id.) Therefore, the ALJ's finding  
 7 that plaintiff's mother has a "vested interest" in the abstract is not a legitimate basis to reject her  
 8 testimony. See Valentine, *supra*, 574 F.3d at 694.

10 In addition, "where the ALJ's error lies in a failure to properly discuss competent lay  
 11 testimony favorable to the claimant, a reviewing court cannot consider the error harmless unless  
 12 it can confidently conclude that no reasonable ALJ, when fully crediting the testimony, could  
 13 have reached a different disability determination." Stout, 454 F.3d at 1056. As plaintiff's mother  
 14 testified that plaintiff "requires rest periods during the day," and "lies down after doing things,"  
 15 (see Tr. 26), the Court cannot conclude that "no reasonable ALJ, when fully crediting the  
 16 testimony, could have reached a different disability determination." Stout, 454 F.3d at 1056.

18 Therefore, the ALJ's legal error when evaluating the testimony of plaintiff's mother  
 19 cannot be considered harmless. See id. For this reason, the Court will set aside the  
 20 Commissioner's denial of social security benefits in this matter. See Bayliss, *supra*, 427 F.3d at  
 21 1214 n.1; see also 42 U.S.C. § 405(g).

23 2. The ALJ did not evaluate properly the plaintiff's testimony and credibility.

24 If the medical evidence in the record is not conclusive, sole responsibility for resolving  
 25 conflicting testimony and questions of credibility lies with the ALJ. Sample v. Schweiker, 694  
 26

---

<sup>1</sup> The Court finds proper the ALJ's rejection of "the mother's testimony that [plaintiff] has no social life," for the reasons given by the ALJ. (Tr. 26.)

1 F.2d 639, 642 (9th Cir. 1999) (*quoting* Waters v. Gardner, 452 F.2d 855, 858 n.7 (9th Cir. 1971)  
 2 (*citing* Calhoun v. Bailar, 626 F.2d 145, 150 (9th Cir. 1980)). An ALJ is not “required to believe  
 3 every allegation of disabling pain” or other non-exertional impairment. Fair v. Bowen, 885 F.2d  
 4 597, 603 (9th Cir. 1989) (*citing* 42 U.S.C. § 423(d)(5)(A)). Even if a claimant “has an ailment  
 5 reasonably expected to produce *some* pain; many medical conditions produce pain not severe  
 6 enough to preclude gainful employment.” Fair, 885 F.2d at 603.

7  
 8 Nevertheless, the ALJ’s credibility determinations “must be supported by specific, cogent  
 9 reasons.” Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998) (citation omitted); see also  
 10 Greger v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006). If an ALJ discredits a claimant’s  
 11 subjective symptom testimony, the ALJ must articulate specific reasons for doing so. Greger v.  
 12 Barnhart, 464 F.3d 968, 972 (9th Cir. 2006). In evaluating a claimant’s credibility, the ALJ  
 13 cannot rely on general findings, but ““must specifically identify what testimony is credible and  
 14 what evidence undermines the claimant’s complaints.”” Id. at 972 (*quoting* Morgan v. Comm’r  
 15 of Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999)); Reddick, 157 F.3d at 722 (citations  
 16 omitted); Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996) (citations omitted). The ALJ  
 17 may consider “ordinary techniques of credibility evaluation,” including the claimant’s reputation  
 18 for truthfulness and inconsistencies in testimony, and may also consider a claimant’s daily  
 19 activities, and “unexplained or inadequately explained failure to seek treatment or to follow a  
 20 prescribed course of treatment.” Smolen, 80 F.3d at 1284. The decision of the ALJ should  
 21 “include a discussion of why reported daily activity limitations or restrictions are or are not  
 22 reasonably consistent with the medical and other evidence.” SSR 95-5p 1995 SSR LEXIS 11.  
 23 “[I]f a claimant ‘is able to spend a *substantial part* of her day engaged in pursuits involving the  
 24 performance of physical functions that are transferable to a work setting, a specific finding as to  
 25  
 26

1 this fact may be sufficient to discredit a claimant's allegations.” Vertigan v. Halter, 260 F.3d  
2 1044, 1049 (9th Cir. 2001) (*quoting* Morgan, 169 F.3d at 600) (emphasis added in Vertigan).

3 The determination of whether to accept a claimant's testimony regarding subjective  
4 symptoms requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929; Smolen, 80 F.3d at  
5 1281 (*citing* Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986)). First, the ALJ must determine  
6 whether there is a medically determinable impairment that reasonably could be expected to cause  
7 the claimant's symptoms. 20 C.F.R. §§ 404.1529(b), 416.929(b); Smolen, 80 F.3d at 1281-82.  
8 Once a claimant produces medical evidence of an underlying impairment, the ALJ may not  
9 discredit the claimant's testimony as to the severity of symptoms “based solely on a lack of  
10 objective medical evidence to fully corroborate the alleged severity of pain.” Bunnell v. Sullivan,  
11 947 F.2d 341, 343, 346-47 (9th Cir. 1991) (*en banc*) (*citing* Cotton, 799 F.2d at 1407). Absent  
12 affirmative evidence that the claimant is malingering, the ALJ must provide specific “clear and  
13 convincing” reasons for rejecting the claimant's testimony. Smolen, 80 F.3d at 1283-84;  
14 Reddick, 157 F.3d at 722 (*citing* Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1996); Swenson v.  
15 Sullivan, 876 F.2d 683, 687 (9th Cir. 1989)).

16 In her written decision, the ALJ gives three reasons in support of her decision to  
17 “discount[] [plaintiff]’s testimony.” (See Tr. 25-26.) First, the ALJ “notes that [plaintiff]’s  
18 allegations of severe side effects from his pain medications are not documented in the medical  
19 evidence, nor is there any indication of attempts to adjust his medications.” (Tr. 25.) However,  
20 these reasons do not provide much support for the adverse credibility finding as plaintiff’s  
21 certified physician’s assistant assigned functional limitations to plaintiff on the basis of his pain  
22 medications. (Tr. 433.) The basis for limitations in plaintiff’s cognitive abilities was that he was  
23 “mentally intact when not taking oxycodone--however, must take B/D [*bis die*, *i.e.*, twice daily]  
24  
25  
26

1 for pain which [affects his] ability to drive, attend, [and] concentrate.” (Id.) The certified  
 2 physician’s assistant also concluded that plaintiff’s cognitive limitations were not likely to  
 3 dissipate within 60 days of “sobriety,” as “[plaintiff] must continue to take oxycodone for pain.”  
 4 (Id.) Therefore, the ALJ’s finding “that [plaintiff’s] allegations of severe side effects from his  
 5 pain medications are not documented in the medical evidence” is not supported by the medical  
 6 record. In addition, according to the relevant federal regulations, side-effects of medication taken  
 7 for pain should be considered when assessing allegations of disabling symptoms. See 20 C.F.R.  
 8 §§ 404.1529(c)(3)(iv), 416.929. For these reasons, the Court concludes that the ALJ committed  
 9 legal error in her assessment of plaintiff’s side effects resulting from his pain medications.  
 10

11 The next reason given by the ALJ in support of her decision to “discount[] [plaintiff]’s  
 12 testimony,” similarly is unavailing. (See Tr. 25-26.) The ALJ found that plaintiff’s “description  
 13 of ongoing severely limited neck motion and the need to support his neck are not supported by  
 14 the medical records . . . . The recent VAMC treatment records contain no examination  
 15 findings to support those allegations.” (Tr. 26.) However, the VAMC treatment records contain  
 16 the objective finding by Dr. Loueen J. Boyle, M.D., that plaintiff “always sits with head forward  
 17 and has gritted teeth.” (Tr. 131.) The same VAMC records also include a referral to physical  
 18 therapy for plaintiff’s “terrible neck pain.” (Tr. 169.) The VAMC physical therapy record  
 19 includes plaintiff’s subjective report that he is “unable to tolerate upright neutral head position  
 20 and limited neck lateral flexion to the Rt.” (Tr. 170.) Finally, the VAMC treatment records  
 21 include the objective finding that plaintiff suffers from “problems with holding head up [while]  
 22 driving,” as well as the assessment that plaintiff was “*writhing in pain when positioned with*  
 23 *neutral neck position* in supine.” (Tr. 170 (emphasis added).) For these reasons, the Court  
 24 concludes that the ALJ’s finding that plaintiff’s “description of ongoing severely limited neck  
 25  
 26



1 motion and the need to support his neck are not supported by the medical records” is directly  
2 contrary to the VAMC medical records, which provide support for plaintiff’s description and  
3 alleged need to support his neck. (Tr. 26, 131, 169, 170.)

4       The final reason given by the ALJ in support of her decision to “discount[] [plaintiff]’s  
5 testimony,” was that plaintiff’s “activities of daily living are inconsistent with disabling  
6 impairments.” (Tr. 25, 26.) The ALJ lists plaintiff’s activities, including “listening to the radio,  
7 reading the newspaper, taking a walk of half a mile, and helping his disabled mother.” (Tr. 26.)  
8 The ALJ discussed how plaintiff reported that he could “prepare his own meals, do laundry and  
9 balance a checkbook.” (Id.) However, the ALJ also noted that plaintiff “testified that he can only  
10 do chores for 15-20 minutes at a time and indicated that he then has to lie down.” (Id.)

11       The ALJ did not find specifically that plaintiff was “able to spend a *substantial part* of  
12 h[is] day engaged in pursuits involving the performance of physical functions that are  
13 transferable to a work setting.” Vertigan v. Halter, 260 F.3d at 1049. Therefore, a general  
14 listing of daily activities that may not be transferable to a work setting, is not “sufficient to  
15 discredit a claimant’s allegations.” Id. The ALJ gives no reason to discount plaintiff’s  
16 testimony regarding his need to lie down after only 15-20 minutes of doing chores. (Tr. 26.)  
17 Based on a review of the relevant record, the Court concludes that the ALJ’s finding that that  
18 plaintiff’s “activities of daily living are inconsistent with disabling impairments” (Tr. 26) is not a  
19 finding based on substantial evidence in the record as a whole. Bayliss, supra, 427 F.3d at 1214  
20 n.1.

21       For the aforesaid reasons, and based on a review of the relevant record, the Court  
22 concludes that the ALJ committed legal error in her evaluation of plaintiff’s testimony and  
23 credibility, providing an independent basis for reversal and remand of this matter.  
24  
25  
26

1        3. Following remand, the ALJ should reevaluate the medical evidence.

2            The Court already has concluded that the ALJ committed legal error in her evaluation of  
 3 the lay witness testimony provided by plaintiff's mother, as well as in her evaluation of  
 4 plaintiff's testimony and credibility. See supra, sections 1 and 2. In addition, when evaluating  
 5 plaintiff's credibility, the ALJ erroneously characterized the medical record. See supra, section 2.  
 6 Therefore, the Court concludes that the ALJ's evaluation of the medical evidence was affected  
 7 by her legal errors, and as a result, the ALJ must reevaluate the medical evidence anew following  
 8 remand of this matter.  
 9

10        4. This case should be reversed and remanded for further evaluation by the Administration.

11            The Ninth Circuit has put forth a "test for determining when evidence should be  
 12 credited and an immediate award of benefits directed." Harman v. Apfel, 211 F.3d 1172,  
 13 1178 (9th Cir. 2000). It is appropriate where:  
 14

15            (1) the ALJ has failed to provide legally sufficient reasons for rejecting such  
 16 evidence, (2) there are no outstanding issues that must be resolved before a  
 17 determination of disability can be made, and (3) it is clear from the record  
 18 that the ALJ would be required to find the claimant disabled were such  
 19 evidence credited.

20            Harman, 211 F.3d at 1178 (*quoting* Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir.1996)).

21            Here, outstanding issues must be resolved, and the medical evidence is not conclusive.  
 22 See Smolen, supra, 80 F.3d at 1292. In addition, the ALJ is responsible for determining  
 23 credibility and resolving ambiguities and conflicts in the medical evidence. Reddick v. Chater,  
 24 157 F.3d 715, 722 (9th Cir. 1998); Andrews v. Shalala, 53 F.3d 1035, 1043 (9th Cir. 1995). If  
 25 the medical evidence in the record is not conclusive, sole responsibility for resolving conflicting  
 26 testimony and questions of credibility lies with the ALJ. Sample v. Schweiker, 694 F.2d 639,

1 642 (9th Cir. 1999) (*quoting* Waters v. Gardner, 452 F.2d 855, 858 n.7 (9th Cir. 1971) (*citing*  
2 Calhoun v. Bailar, 626 F.2d 145, 150 (9th Cir. 1980)).

3 Therefore, remand is appropriate to allow the Administration the opportunity to consider  
4 properly the testimony by the lay witness as well as by the plaintiff, and to incorporate this  
5 proper evaluation into the reconsideration of the medical evidence and plaintiff's Residual  
6 Functional Capacity. See Sample, 694 F.2d at 642.  
7

8 CONCLUSION

9 The ALJ committed legal error in the evaluation of the lay witness testimony by  
10 plaintiff's mother, as well as in the evaluation of the testimony by plaintiff, and as a result, must  
11 reevaluate the medical evidence. Therefore, following remand of this matter, the Administrative  
12 Law Judge shall begin the five-step sequential disability evaluation at the determination of  
13 plaintiff's Residual Functional Capacity, and shall complete the remaining steps of the disability  
14 evaluation as necessary.  
15

16 Because the ALJ committed legal error in the evaluation of the testimony by the lay  
17 witness as well as by the plaintiff, the decision of defendant on this matter is REVERSED and  
18 REMANDED.

19 IT IS SO ORDERED.

20 Dated this 4th day of May, 2011.  
21

22   
23

24 J. Richard Creatura  
25 United States Magistrate Judge  
26